No. 84-4 (7)

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

WILLIAMSON COUNTY
REGIONAL PLANNING COMMISSION, ET AL.,
Petitioners,

v.

HAMILTON BANK OF JOHNSON CITY,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE CITY OF ST. PETERSBURG, FLORIDA IN SUPPORT OF REVERSAL

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INTEREST OF *AMICUS CURIAE*

The City of St. Petersburg is a political subdivision of the State of Florida within the meaning of Rule 36 of the Rules of this Court and is thereby entitled to file its brief *amicus curiae.*

The City of St. Petersburg is genuinely interested in the instant case because this Court's determination of the question presented on certiorari will greatly affect the outcome of current and threatened litigation against the City involving the application of the Just Compensation Clause of the Fifth Amendment to the City's regulation of the use of land. A decision by this Court affirming the opinion of the court below could economically and adversely affect the City of St. Petersburg's exercise of its regulatory power in even the most conventional areas of land use regulation.

SUMMARY OF ARGUMENT

Just compensation under the Fifth Amendment of the U.S. Constitution is required only where a governmental act invades a private domain *and* creates a public domain, and where the government has manifested an intent to create a public domain in the affected property.

The history of the Just Compensation Clause and construction of the Clause prior to and in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), established the constitutional imperative that the government is required to pay just compensation only when the government converts a private domain into a public domain. *Mugler v. Kansas*, 123 U.S. 623 (1887).

That *Pennsylvania Coal* stated the minimum beneficial use rule is unequivocable. That rule places a limitation on exercises of governmental authority, other than the power of eminent domain, such that each landowner retains a minimum private beneficial use of his property. However, that decision does not hold that the minimum beneficial use rule commands just compensation for every overly restrictive government regulation. *Pennsylvania Coal* simply does not stand for the proposition claimed by the Sixth Circuit below or by the dissent in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981) (Brennan, J., dissenting).

The mixing of the corollary rule of minimum beneficial use with the just compensation imperative by the dissent in *San Diego Gas & Electric Co.* and the Sixth Circuit Court is improper and has resulted in a judicial quagmire. An objective look from both historical and modern viewpoints indicates that Justice Holmes used the word "taking" in the *Pennsylvania Coal* decision not to describe an event requiring payment of just compensation, but as a shorthand description of an *invalid* regulation, a regulation that "goes too far." *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908); *Fred F. French Investing v. City of New York*, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976).

Furthermore, temporary interference with the use of land does not constitute a taking. *Andrus v. Allard*, 444 U.S. 51 (1979); *Metro Realty v. County of El Dorado*, 222 Cal. App. 2d 508, 35 Cal. Rptr. 480 (1963). Sufficient damage in the constitutional sense, namely, a total deprivation, has not been incurred. *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). Moreover, if the rule proposed by the court below is allowed to stand, the balance of power between the legislative and judicial branches of government will be irreparably disrupted—a result not intended by Justice Holmes' opinion in *Pennsylvania Coal*. For these reasons, the City of St. Petersburg respectfully requests this Court to reverse the opinion of the Court of Appeals for the Sixth Circuit.

ARGUMENT

A.

Introduction

The City of St. Petersburg respectfully urges this Honorable Court to fairly and clearly circumscribe the application of the Fifth Amendment Just Compensation Clause to the police power regulation of the use of land and to hold that just compensation is required only where:

(1) a governmental act invades a private domain *and* creates a public domain, and

(2) the government has manifested an intent to create a public domain in the affected property.

B.

Historically, just compensation was required only where government invaded a private domain and replaced it with a public domain.

For years the debate over the so-called "taking issue" has raged in the commentaries, the classrooms, and the courts, and on several occasions this Court has reached the periphery of the issue, unfortunately with little settling effect. See *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978); *Kaiser Aetna v. United States,* 444 U.S. 164 (1979); *Agins v. City of Tiburon,* 447 U.S. 255 (1980); and *San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621 (1981). The City of St. Petersburg respectfully submits that the time has come for this Court to impart clarity, certainty and continuity to this most important area of constitutional jurisprudence.

At the core of the "taking issue" is the Fifth Amendment of the U.S. Constitution which provides in pertinent part: "nor shall private property be taken for public use, without just compensation." On its face the clause is nothing more than its

historical antecedents[1]—a constitutional imperative that the government is required to pay just compensation when the

[1] Our modern constitutional doctrine has its roots from Medieval England where the King was entitled to levy charges for the defense of his kingdom and for other royal purposes against those who held land. Out of attempts of English landholders to resist these levies emerged the Magna Carta. Of import to the current issue is Chapter 29 of the Magna Carta which usually translates as follows:

> No freeman shall be arrested, or detained in prison, *or deprived of his freehold,* or in any way molested; and we will not set forth against him, nor send against him, *unless by the lawful judgment of his peers and by the law of the land.* (emphasis added).

The Clause is sometimes called Article 39 because the original 12.. Magna Carta contained 63 articles, of which the above was Article 39 By 1225 the Charter consisted of 37 Articles as the original 63 were pared down and consolidated of which the aforementioned was number 29. Faith Thompson, *The First Century of the Magna Carta,* (1926) at 2-3. The translation is from the following Latin text as reported by both McKechnie and by Coke:

> *Nulles liber homo* capiatur, vel imprisonetur, *aut disseisatur,* aut utlagetur, aut aliquo m do destruatur, nec super eum ibimus, nec super eum mittemus, *nisi per legale judicium parium suorum vel per legem terre.* (emphasis added).

Edwardo Coke, (Milite) *The Second Part of the Institutes of the Laws of England* (London 1797) at page 45. The translation of this text, especially the italicized portion, varies considerably, sometimes reading "No free man shall be . . . stripped of his . . . possessions," or, as in Coke's Second Institutes, "No man shall be disseised . . . ." Coke, *supra* at page 46.

The colonists brought with them to the New World the ideas of Seventeenth and Eighteenth Century England. To understand the intellectual atmosphere which generated the Due Process Clause and the Just Compensation Clause, it is necessary to briefly examine prevalent legal and political concepts of Eighteenth Century America.

That judicial process must comport with basic standards of procedural fairness was an ancient English tradition which was melded by Sir Edward Coke with the revival of the Magna Carta to promote a theory of parlimentary supremacy. F. Bosselman, D. Callies and J. Banta, *The Taking Issue* (1973) at p. 89. In

(Footnote continued on following page.)

government converts a private domain into a public domain. *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871). *See generally,*

(Footnote continued from preceding page.)

addition to the extensive reading of the works of Coke, works by Sir William Blackstone were widely circulated during the colonial period. Blackstone, a strong advocate of the rights of liberty and property, went further than Coke and argued that even Parliament could not give consent to the King appropriating property for his own use unless the landowners were paid compensation:

> So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modeled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an execution of power, which the legislature indulges with caution, and which nothing but the legislature can perform.

Robert Malcom Kerr, *The Commentaries on the Laws of England of Sir William Blackstone* (1876) at 109-110.

In James Madison's initial draft of the United States Bill of Rights, he followed closely the Virginia Declaration of Rights which

(Footnote continued on following page.)

F. Bosselman, D. Callies and J. Banta, *The Taking Issue* (1973). The clause has also been construed as constituting

(Footnote continued from preceding page.)

provided that "men . . . cannot be taxed or deprived of their property for public uses without their own consent, or that of their representatives . . . ." Virginia Declaration of Rights, Section 6, and "that no man be deprived of his liberty except by the law of the land, or the judgment of his peers." *Id.*, Section 8. When Madison's draft was offered to the House in a speech during the first session of Congress, on June 8, 1789, it added a requirement of "just compensation":

> No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

"Madison Debates," 1 *Annals of Congress,* 1st Congress, 1st Session (1789) at 451-452; William B. Stoebuck, "A General Theory of Eminent Domain," 47 *Wash. L. Rev.* 553, at 595; Edmond Dumbauld, *The Bill of Rights and What it Means Today,* at 207.

The language, but not the substance changed slightly in Committee, probably also the work of Madison, and in Conference with the Senate, to its present form. Dumbauld, *supra,* at 211. The amendments were debated in the House and the Senate but apparently no record of any debate on the Just Compensation Clause exists. F. Bosselman, D. Callies and J. Banta, *The Taking Issue,* at 99.

All of these sources—English precedent, including the Magna Carta and other documents based on it, natural law, and civil law jurisprudence undoubtedly inspired Madison in his composition of the language of the Fifth Amendment. It should be remembered though that the Bill of Rights was intended to limit both the legislative and executive branches of the new government.

Certainly it would have been no limitation on the legislative branch to require that takings of property be in accordance with "the law of the land"—it was the legislature, after all, that would be making the law of the land. It is possible, therefore, that the just compensation language was added merely in an attempt to give some meaning to an oft-cited clause that would otherwise have been out of place. F. Bosselman, D. Callies and J. Banta, *The Taking Issue,* at 103. In the debates Madison expressed concern with the inadequacy of restraints on the legislature under the English system. *See, Annals of Congress,* 436 (1895).

something more: a limitation on exercises of governmental authority, other than the power of eminent domain, such that each landowner retains a minimum private beneficial use of his property. And therein lies the source of the legal cacophony of the "taking issue" that has drowned out reason and rationality in the evolution of modern land use controls because some courts have blended this corollary rule of minimum beneficial use with the just compensation imperative.

The source of the minimum beneficial use rule is obscure. In *Mugler v. Kansas*[2] this Court, unrestrained by the minimum beneficial use rule, sustained a prohibition on the brewing of beer even though it had the effect of destroying the "chief value" of a brewery. This was because this Court read *Pumpelly v. Green Bay Co.*,[3] the apparent "source" of the corollary rule as holding that just compensation is only required where:

> there was a "permanent flooding of private property," a "physical invasion of the real estate of the private owner, and a practical ouster of his possession." *His property was, in effect, required to be devoted to the use of the public, and, consequently, he was entitled to compensation.*[4]

Nevertheless, in *Pennsylvania Coal Co. v. Mahon*[5] the minimum beneficial use rule was stated unequivocably:

> The protection of private property in the Fifth amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend its qualification more and more until at last private

[2] 123 U.S. 623 (1887).
[3] 80 U.S. 166 (1871).
[4] 123 U.S. at 668.
[5] 260 U.S. 393 (1922).

> property disappears. *But that cannot be accomplished in this way under the Constitution of the United States.*[6]

Justice Holmes cited no precedence for the proposition, yet it has been clear that the police power can only go so far:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.[7]

C.

The minimum beneficial use requirement of *Pennsylvania Coal* does not command just compensation for every overly restrictive regulation.

The City of St. Petersburg has no problem with the minimum beneficial use rule and readily accepts the logic of Holmes' pronouncement; however, the City respectfully submits that the proposition does not require, either as a matter of precedence or logic, that an exercise of the police power that does not involve the creation of a public domain, but is judicially determined to go "too far," requires just compensation.

[6] 260 U.S. at 415 (emphasis added). See *Rideout v. Knox*, 148 Mass. 368, 19 N.E. 390 (1889). Holmes' source for his pronouncement seems to have been largely a matter of judicial philosophy.
[7] 260 U.S. at 413.

First, Holmes' opinion simply does not stand for the proposition claimed by the Sixth Circuit or Justice Brennan's dissent in *San Diego Gas & Electric Co v. City of San Diego.*[8]

For years, "taking" mavens[9] have claimed that Justice Holmes' opinion in *Pennsylvania Coal*[10] stands for the proposition that "just compensation" must be paid when a police power regulation is declared to be confiscatory.[11] Literally thousands of lawsuits have been instituted under this theory of so-called "inverse condemnation;"[12] the debate over the availability of just compensation for "regulatory takings" has raged for years across the nation.[13]

The "taking" theorem "has its source" in Justice Holmes' opinion in *Pennsylvania Coal:*

> The rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.[14]

An objective look at the opinion in *Pennsylvania Coal,* however, does not support the Sixth Circuit Court's hypothesis because it is evident that Holmes used the word "taking" in the opinion not to describe an event requiring payment of just compensation, but as a shorthand description of an *invalid* regulation.

At the simplest level, the issue in *Pennsylvania Coal* was the *validity* of a statute of the State of Pennsylvania which prohibited the mining of coal which would result in the subsidence of improvements on the surface of the land (principally roads and houses). The coal company challenged the Act on the grounds that it "destroy[ed] previously existing rights of property and contract" and the Supreme Court found itself confronted with the question of "whether the police power can be stretched so far."[15] Holmes' answer was that the police power could not be extended so far and that a total prohibition of the coal company's use of its property "cannot be accomplished *in this way* under the Constitution of the United States" and was therefore invalid.[16] This Court did not hold, as is often claimed, that the Kohler Act had actually effected a taking for public use which required payment of just compensation; rather, the Court found that the regulatory attempt to go "so far" was *invalid.*

> It is our opinion that the act *cannot be sustained* as an exercise of the police power.[17]

That Holmes did not say that a police power regulation that "goes too far" actually becomes an exercise of the power of eminent domain is clear from his opinion:

> [S]ome values are enjoyed under an implied limitation and must yield to the police power. *But obviously the implied limitation must have its limits,* or the contract and *due process clauses are gone.* One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases *there must be an exercise of eminent domain and compensation* to sustain the act.[18]

The clarity of this proposition is apparently obscured for many by an ambiguous statement later in the opinion that "this is a question of degree" not "disposed of by general proposi-

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[8] 450 U.S. 621 (1981). See n.21, *infra.*

[9] See Comment, Gideon Kanner, 33 *Land Use Law & Zoning Digest* (May 1981).

[10] 260 U.S. 393 (1922).

[11] *See generally,* F. Bosselman, D. Callies & J. Banta, *The Taking Issue* (1973).

[12] *See Agins* v. *City of Tiburon,* 447 U.S. 255, 258, n.2 (1980).

[13] C. Haar, *Land-Use Planning* 766 (3rd Ed. 1977). The amount of energy devoted to this subject is unfathomable.

[14] 260 U.S. at 415.

[15] 260 U.S. at 413.

[16] 260 U.S. at 415 (emphasis added).

[17] 260 U.S. at 414 (emphasis added).

[18] 260 U.S. at 413 (emphasis added).

tions."[19] The Court of Appeals for the Sixth Circuit and Justice Brennan construe this language as meaning that the police power and the power of eminent domain differ only "as a matter of degree" and that the nature of the power involved is determined by its effect on the value of property. Holmes' opinion *in pari materia,* taken together with his prior opinions on the subject, reveals that the "question of degree" to which Holmes referred was the *effect* of public action, not the nature of the power involved. That the effect of eminent domain and the police power on private property differ only as a matter of degree does not mean that the powers themselves differ only as a matter of degree. Indeed, the law recognizes the police power and the eminent domain power as separate and distinct powers and subjects them to differing procedural and substantive due process requirements.

D.

The word "taking" in *Pennsylvania Coal* was used as a metaphor and does not command just compensation for the deprivation of the minimum beneficial use of property.

Holmes' use of the word "taking", and its intended meaning, were cogently analyzed in *Fred F. French Investing v. City Of New York*[20] by then Chief Judge Breitel of the New York Court of Appeals:

> True, many cases have equated an invalid exercise of the regulatory zoning power, perhaps only *metaphorically,* with a "taking" or a "confiscation" of property, terminology appropriate to the eminent domain power and the concomitant right to compensation when it is exercised.
>
> . . .
>
> The *metaphor* should not be confused with the reality. Close examination of the cases reveals that in none of

[19] 260 U.S. at 416.

[20] 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976).

> them, anymore than in the *Pennsylvania Coal* case (*supra*), was there an actual "taking" under the eminent domain power, despite the use of the terms "taking" or "confiscatory". Instead, in each the gravamen of the constitutional challenge to the regulatory measure was that it was an invalid exercise of the police power under the due process clause. . . .[21]

Notwithstanding the logic of Breitel's analysis, Justice Brennan in his dissent in *San Diego Gas and Electric Co.* dismisses the metaphor analysis as "tampering with the express language of the opinion" of Justice Holmes.[22] To the contrary, the express language of Justice Holmes' opinion, taken *in pari materia,* confirms the metaphor. The issue in *Pennsylvania Coal* was not whether the State of Pennsylvania's enactment of

[21] 39 N.Y. 2d at 594 (emphasis added). One explanation of Holmes' recourse to the "taking" metaphor is the judicial environment at the time of the *Pennsylvania Coal* decision. Holmes was an outspoken critic of the Supreme Court's use of substantive due process as a vehicle for invalidating state legislation. See e.g. *Lochner v. City of New York,* 198 U.S. 45 (1905) (Holmes, J., dissenting). He openly decried the Court's open-ended use of due process whereby judicial judgments were substituted for that of legislative branches of government. In *Pennsylvania Coal,* however, Holmes found himself confronted by a statute that he apparently could not support ("The damage is not common or public. The extent of the public interest is shown by the statute to be limited . . ." 260 U.S. 393, 413 (1922) (citation omitted).) Yet to invalidate the statute as violative of the Due Process Clause would have placed Holmes in the unthinkable position of invoking substantive due process to invalidate a state statute. His use of the "taking" metaphor permitted Holmes to invalidate the act on the basis of substantive due process but with a limitation that was not open-ended because his standard was limited to an objective determination of minimum beneficial use. It would be an unfortunate irony if Holmes' attempt to limit judicial interference with legislative policy to its narrowest possible confines were, 60 years later, to serve as the vehicle for the most disruptive judicial incursion ever into the legislative process, a decision that would convert every invalid legislative act into a crippling claim on the public fisc.

[22] 450 U.S. at 649, n.14.

the Kohler Act was compensable, but whether the Act was *valid.* (See Argument for Plaintiff in Error "The statute *takes* the property of the Coal Company without *due process of law.*"[23]) In fact, one argument advanced by the coal company was that "[i]f surface support in the anthracite district is necessary for public use, it can constitutionally be acquired *only by condemnation* with just compensation to the parties affected."[24]

The word "taking" first appears on page 414 of the opinion in *Pennsylvania Coal* where Holmes is discussing the balance of public and private interests involved in the case:

> "[T]he extent of the public interest is shown by the statute to be limited. . . . On the other hand the extent of the *taking* is great."[25]

If Holmes had intended the word "taking" in the literal sense that Justice Brennan and the Sixth Circuit now ascribe to it, Holmes would have gone no further because a "taking" is a "taking" is a "taking," and once it is effected, no matter how small, mandates payment of just compensation.[26] It is imprudent, at the least, to enshrine what is by definition "mere *dictum*" as sanctimony; and, if one reads the "express language" of *Pennsylvania Coal,* one cannot help but see the metaphorical nature of Holmes' use of the word "taking." Holmes was not using the word to describe "taken for public use" but was using it as a shorthand description of the *effect* public action may have on the value of property. The Sixth Circuit Court's rigid literalism in its reading of Holmes' opinion

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[23] 260 U.S. at 395 (emphasis added).
[24] 260 U.S. at 400 (emphasis added).
[25] 260 U.S. at 414 (emphasis added).
[26] This is precisely what Justice Brennan opines in his dissent. 450 U.S. at 653-54.

is particularly ironic in the face of Justice Holmes' oft-quoted appreciation for the dynamic character of language:

> A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time which it is used.[27]

That Holmes used the word in a "metaphorical" sense is supported not only by the language and the result in *Pennsylvania Coal* but is also supported by his use of the word "taking" to refer to a statute's invalidity in other cases involving constitutional limitations on exercises of the police power. For example, in *Block v. Hirsch,*[28] Justice Holmes used the word "taking" in an obviously metaphorical sense:

> All the elements of a public interest justifying some degree of public control are present. The only matter that comes to us open to debate is whether the statute goes too far. For just as there seems a point at which the *police power ceases and leaves only that of eminent domain,* it may be conceded that regulations of the present sort pressed to a certain height might amount to a *taking without due process of law.*[29]

Similarly, in *Martin v. District of Columbia,*[30] Holmes made it clear that he did not regard an overly restrictive regulation as triggering an award of compensation. Rather, he indicated that an actual taking under the Fifth Amendment can be accomplished only through an exercise of the power of eminent domain—not by regulatory inadvertence:

> Under the police power, in its strict sense, a certain limit might be set to the height of buildings without compensation; but to make that limit five feet would require compensation *and taking by eminent domain.*[31]

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[27] *Towne v. Eisner,* 245 U.S. 418, 425 (1918).
[28] 256 U.S. 135 (1921).
[29] 256 U.S. at 156 (emphasis added).
[30] 205 U.S. 135 (1907).
[31] 205 U.S. at 139 (emphasis added).

The most explicit statement of the Holmesean "taking" metaphor is found in *Hudson County Water Co.* v. *McCarter*:[32]

> [T] police power may limit the height of buildings, in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and *the police power would fail.* To set such a limit would need compensation and *the power of eminent domain.*[33]

Moreover, the "taking" metaphor was in common usage as a short hand description of a regulatory action that was *invalid* at the time of Holmes opinion.[34] Simply put, Holmes was not

[32] 209 U.S. 349 (1908).

[33] 209 U.S. at 355 (emphasis added).

[34] *See, e.g., Bauman v. Ross,* 167 U.S. 548 (1897) ("failed to provide for the just compensation required by the Constitution . . . and . . . was . . . consequently . . . void." (emphasis added)). In point of fact, the "taking" metaphor was in common usage as a short hand description of a regulatory action that was *invalid* at the time of Holmes' opinion in *Pennsylvania Coal v. Mahon,* 260 U.S. 393 (1922). *See e.g., Bill Posting Sign Co. v. Atlantic City,* 71 N.J.L. 72, 58 A. 342 (1904) ("a statute which purports to give unlimited power to regulate the erection of signs on private property would be an attempt to authorize the *appropriation* of private property to public use without compensation, and [is] therefore *inimical* to our constitutional provision." (emphasis added)); *Stockdale v. Rio Grande Western Ry. Co.,* 28 Utah 201, 209-10, 77 P. 849, 852 (1904); *Hartman v. Tresise,* 36 Colo. 146, 84 P. 685 (1905); *State v. Robb,* 100 Me. 189, 186, 60 A. 874, 876 (1905) ("It may therefore be regarded as settled that reasonable health regulations . . . are not *void* as *taking* property without due process of law, or as a *taking* of private property without . . . just compensation" (emphasis added)); *Riley v. Town of Greenwood,* 76 S.C. 90, 96, 51 S.E. 532, 534 (1905) ("[t]he ordinance in question was *illegal,* as an attempt . . . to *take* the property of the plaintiff without compensation and to deprive her of her property without due process of law." (emphasis added));

(Footnote continued on following page.)

saying that an overly restrictive regulation actually effects a compensable taking; rather, he was making the point that the Constitution says that government can accomplish a prohibition of all practical use of property only through an exercise of the power of eminent domain.

> [S]ome values are enjoyed under the implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the

(Footnote continued from preceding page.)

M. Wineburgh Advertising Co. v. Murphy, 129 A.D. 260, 262, 113 N.Y.S. 885, 887 and 886 (App. Div. 1980), *aff'd,* 195 N.Y. 126, 88 N.E. 17 (1909) ("It is quite clear that the ordinance constitutes a *taking* of the property . . . the ordinance . . . cannot be *upheld* as a valid exercise of the police power. . . ." (emphasis added)); *City of St. Louis v. Dreisoerner,* 243 Mo. 217, 147 S.W. 998 (1912); *Vreeland v. Forest Park Reservation Commission,* 82 N.E. Eq. 349, 87 A. 435 (1913); *Standard Bill Posting Co. v. Hastings,* 77 Misc. 453, 137 N.Y.S. 186 (Sup. Ct.), *aff'd,* 153 A.D. 920, 138 N.Y.S. 1137 (1912), *aff'd,* 207 N.Y. 763, 101 N.E. 1118 (1918); *Romar Realty Co. v. Board of Commissioners of Haduonfield,* 96 N.J.L. 117, 120, 114 A. 248, 250 (1921) ("*Deprivation* or limited use of one's property is unlawful, and the ordinance which compels it is *invalid,* if the *taking* cannot be justified by the exercise of the police power." (emphasis added)); *In re Kansas City Ordinance No. 39946,* 298 Mo. 569, 252 S.W. 404 (1923); *Piper v. Ekern,* 180 Wis. 586, 194 N.W. 1076, 130 A. 534 (1925) ("This provision is, in our opinion, *illegal.* It is not a *valid* exercise of the police power. It is the *taking* of private property for public purposes without just compensation being made to the owner." (emphasis added)); *Ware v. City of Wichita,* 113 Kan. 153, 214 P. 99 (1923); *Johnson v. City of Charleston,* 91 W.Va. 318, 112 S.E. 577 (1922); *State v. Hillman,* 110 Conn. 92, 105, 147 A. 294, 299 (1929) ("Regulations may result to some extent practically in the *taking* of property, or the restricting its uses, and yet not be deemed confiscatory or unreasonable." (emphasis added)). In not one of these cases is the term "taking," as applied to a regulatory action, given literal meaning and in not one of them were money damages awarded.

> extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act.[35]

Read in its entirety, the *Pennsylvania Coal* opinion recognizes that there are two separate and distinct powers. Regulations which are overly restrictive in the constitutional sense—that is, have an effect which is equivalent to a taking for public use (which can only be accomplished through an exercise of the power of eminent domain)—are invalid. This distinction is expressly established in Holmes' closing paragraph:

> We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it and we assume that an exigency exists that would warrant the exercise of eminent domain.[36]

There is other evidence that Holmes had no intention of rewriting the Constitution and overruling the holding of *Mugler v. Kansas,*[37] as Justice Brennan and the Sixth Circuit would

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[35] 260 U.S. at 413.

[36] 260 U.S. at 416.

[37] 123 U.S. 623 (1887). What Holmes actually intended in *Pennsylvania Coal* is difficult to discern, however, his focus is at least partially revealed in his correspondence with Sir Frederich Pollock. Holmes wrote:

> I enclose one of my last decisions that you may judge whether there is any falling off. It was unpopular in Pennsylvania of course. Brandeis' dissent speaks as if what I call average reciprocity of advantage were made the general ground by me. Not so I use that only to explain a particular case. My ground is that the public only got to this land by paying for it and that if they saw fit to pay only for a surface right they can't enlarge it because they need it now any more than they could have taken the right of being there in the first place. Perhaps it would have been well if I had

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have us believe. Just three years before *Pennsylvania Coal,* Holmes wrote an opinion in *Pierce Oil Corp. v. City of Hope,*[38] wherein he considered the validity of a municipal regulation governing the location of petroleum storage tanks. In sustaining the regulation, Holmes cited *Mugler,* the case the pundits now claim he overruled in *Pennsylvania Coal.*[39] Surely Holmes, so obviously familar with the fundamental principles of *Mugler,* would have explicitly referred to *Mugler* in *Pennsylvania Coal* if he had intended to depart so radically from its holding. Moreover, in *Samuels v. McCurdy,*[40] decided after *Pennsylvania Coal,* Chief Justice Taft quoted extensively from *Mugler* ("police power is very different from taking") without the slightest hint of dissent from Holmes.[41] It can be assumed that Taft's reliance on *Mugler* would have been decried by so rigorous a legal scholar as Holmes if he had in fact intended to overrule its

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> emphasized more the distinction between the rights of the public in places where they only get any locus standi by a transaction that renounced what they now claim.

And Pollock answered:

> In your later case of the Pennsylvania Coal Co., it seems to me, though I always feel diffident about these constitutional questions, that if Brandeis' dissent were right the Fourteenth Amendment would be eviscerated: and your opinion exposes the fallacy of stretching the police power to that extent in a very convincing fashion. There was no such case on the facts, I suppose, as that the Coal Co. threatened and intended to let down the whole city of Philadelphia and had refused all offers of reasonable compensation. That the destruction of this or that dwelling house taken by itself is necessarily a bad thing is very far from obvious: I know many by sight which I would gladly see devoured by a mine, a dragon, or anything else. . . . M. Howe, *Holmes-Pollock Letters—The Correspondence of Mr. Justice Holmes and Sir Frederich Pollock, 1874-1932* (Cambridge, Mass. 1941).

[38] 248 U.S. 498 (1919).

[39] *See,* 450 U.S. 621 (Brennan, J., dissenting).

[40] 267 U.S. 188 (1925).

[41] 267 U.S. at 196.

precepts in *Pennsylvania Coal. Mugler* was also cited in *Miller v. Schoene,*[42] again without dissent from Holmes. In *Clarke v. Haberle Brewing Co.*[43] Justice Holmes himself drew upon *Mugler v. Kansas* for authority:

> It seems to us plain without help from *Mugler v. Kansas,* 123 U.S. 623, that when a business is extinguished as noxious under the Constitition the owners cannot demand compensation from the Government . . . .[44]

Holmes' "taking" quote does not mean that an overzealous regulation constitutes a compensable event; rather, it indicates that a regulation which has an impact on property equivalent to a "taking" is invalid, void *ab initio.* If the government wishes to achieve such an impact on property—that is, the equivalent of a taking—it must do so through an exercise of the power of eminent domain, not through regulation. To quote Justice Holmes: "When [a restrictive regulation] reaches a certain magnitude, in most if not in all cases *there must be an exercise of eminent domain* . . ."[45]

E.

Modern interpretations of the word "taking" do not command just compensation for the deprivation of the minimum beneficial use of property.

Modern examples of the "metaphorical" use of the word "taking" can also be found. In *Agins v. City of Tiburon,*[46] this Court, in a *per curiam* opinion, used the word "taking" not to describe a compensable event, but as a shorthand description of when a regulation is *invalid.*

> The application of a general zoning law to a particular property effects a *taking* if the ordinance *does not*

[42] 276 U.S. 272 (1928).
[43] 280 U.S. 384 (1930).
[44] 280 U.S. at 386.
[45] 260 U.S. at 413 (emphasis added).
[46] 447 U.S. 255 (1980).

> *substantially advance legitimate state interests,* or denies an owner economically viable use of his land.[47]

In this quote the Court is saying, unmistakeably, that a regulation which *fails to advance a legitimate state interest* (which it is settled violates the *due process clause*) is a "taking": an obvious use of the word "taking" in its metaphorical sense and a shorthand description of a regulation that is *invalid.* In *Penn Central Transporation Co. v. City of New York,*[48] a challenge to the City of New York's landmark preservation regulations, the word "taking" is frequently used in Justice Brennan's majority opinion. Yet, *Penn Central* does not say that a regulation that goes too far requires a payment of just compensation; it says that such a regulation is *invalid.*

> Indeed, we have frequently observed that whether a particular restriction will be rendered *invalid* by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."[49]

In *Pruneyard Shopping Center v. Robins,*[50] the United States Supreme Court considered whether a state court construction of a state constitution subjecting private property to public use constituted a "taking." Once again, "taking" was not used in its literal just compensation sense because the Court held that there had figuratively been a "taking," but not in the constitutional sense.

> [T]he determination whether a state law *unlawfully* infringes a landowner's property in violation of the Taking Clause . . .[51]

[47] 447 U.S. at 260 (emphasis added) (citations omitted).
[48] 438 U.S. 104. Generally regarded as an historic preservation case when published but increasingly viewed as a forecast of taking opinions to come.
[49] 438 U.S. at 124 (emphasis added) (citations omitted).
[50] 447 U.S. 74 (1980).
[51] 447 U.S. at 82-83 (emphasis added).

Pruneyard proposes that a judicial determination that a regulation constitutes a "taking" does not require payment of compensation; the case says that a government action which attempts to effect a "taking" without payment of just compensation, would be *unlawful,* that is, invalid.

Similarly, in *Andrus v. Allard*[52] the word "taking" is used as a shorthand description of a regulation which is invalid. Also, in *Kaiser Aetna v. United States,*[53] this Court was careful to point out that if the government wanted to "take" the interest involved, it could do so *only* by "invoking its eminent domain power *and* paying just compensation . . ."[54]

F.

Temporary interference by government resulting in mere diminution in value of property is not a taking and does not command just compensation.

The "constitutional rule" embraced by the Sixth Circuit Court fails for reasons other than a misreading of Justice Holmes' opinion. For example, the "temporary" or "interim" taking concept is at variance with well-established jurisprudence in regard to moratoria—that is, temporary prohibitions on all use of land. Moratoria are generally regarded as valid exercises of the police power, provided that they are limited in their period of application.

> Reasonableness . . . is the yardstick by which the validity of a zoning ordinance is to be measured and reasonableness in this connection is a matter of degree. A temporary restriction upon land use may be . . . a mere inconvenience where the same restriction

[52] 444 U.S. 51 (1979).

[53] 444 U.S. 164 (1979).

[54] 444 U.S. at 180 (emphasis added).

> indefinitely prolonged might possibly metamorphize possibly into oppression.[55]

Application of the Sixth Circuit Court's "constitutional rule," however, would require a payment of just compensation for any temporary interference with the use of property, a consequence that conflicts with years of established jurisprudence.

The absurdity of the proposed "rule" is underscored in *Agins* where this Court notes that mere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are "incidents of ownership" and *do not constitute a "taking."*

> Even if the appellants ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are "incidents of ownership . . .".[56]

More importantly, it is well-settled that a mere diminution in the value of property does not constitute a violation of the Constitution. In *Andrus v. Allard* this Court described the Hofeldian theory of property and pointed out that the destruction of one strand of the bundle of property rights does not constitute a taking "because the aggregate must be viewed in its entirety."[57] The temporary interference in the use of land for which the Sixth Circuit allows just compensation destroys only one part or one "strand" of the Hofeldian bundle of rights[58] the right to use property during a regulatory embroglio.[59] Property

[55] *Metro Realty v. County of El Dorado,* 222 Cal. App.2d 508, 516, 35 Cal. Rptr. 480, 485 (1963).

[56] 447 U.S. 263 n.9.

[57] 444 U.S. at 66.

[58] Berger, *Land Ownership and Use* § 1.2 (3rd Ed. 1983).

[59] *See, Hernandez v. City of Lafayette,* 643 F.2d 1188 (5th Cir. 1981), *cert. denied,* 455 U.S. 907 (1982), *aff'd after remand,* 690 F.2d 734 (1983).

has value in many dimensions, including total present worth and value over time. (Time sharing or interval ownership are contemporary examples of the division of property into temporal segments.) The inconvenience of a temporary interference in the use of land while a court tests the validity of a police power regulation only destroys a part of one strand of the bundle of rights of property and therefore can hardly be said to be a "taking" when viewed in the aggregate.

Minimal appreciation of real estate finance is required to grasp the fact that a temporary interference in the use of land may have far less impact on the aggregate value of a parcel of land than the diminution in value that was accepted as valid by this Court in *Goldblatt v. Town of Hempstead*[60] or *Andrus v. Allard*. In fact, when compared with the diminution in value involved in *Haas v. City and County of San Francisco*[61] and *Village of Euclid v. Ambler Realty Company*,[62] a mere temporary interruption in use pales in significance.

Consider, for example, a $1,000,000 parcel of land that is downzoned. If the diminution in value is only $900,000, then a minimum beneficial use is preserved to the owner and the landowner's economic loss is deemed to be *damnum absque injuria*. On the other hand, if the diminution in value goes "too far," then just compensation is required for the period the regulation was in place under the Circuit Court's holding. If the period of time of over-regulation is two years, for example, then the actual economic injury to the landowner will be lost rentals for the period (15% × $1,000,000 × 2 yrs. = $300,000). Use of contemporary economic theory to convert the loss of two

[60] 369 U.S. 590 (1962).

[61] 605 F. 2d 1117 (9th Cir. 1979), *cert. denied* 445 U.S. 928, (1980).

[62] 272 U.S. 365 (1926).

years of rental income to a diminution in present value yields an impact that is far less than the injury suffered by the valid downzoning.

In other words, mere fluctuations in value during the process of governmental decision-making including judicial review of local legislative decisions, absent extraordinary delay, should be recognized as "incidents of ownership." They cannot be considered as a "taking" in the constitutional sense. A temporary interference does not displace ownership, does not invade the private domain or does not make actual use of property. To the contrary, a temporary interference, by definition, merely interrupts private use of property. At the most such an interference can only diminish the cumulative value of property over time, and it is well-settled that a mere diminution in value does not invalidate a police power regulation.[63]

> [A] reduction in the value of the property caused by the zoning ordinance is not, of itself, enough to render the ordinance confiscatory.[64]

The Sixth Circuit's proposed "principle" also runs afoul of the long-established concept of balance of powers. If the Circuit Court's constitutional rule is given effect, then the courts will be *obligated* to order compensation in every case of regulatory invalidity. This judicial "transmogrification" of regulatory enactments into exercises of the power of eminent domain would upset the delicate balance between co-equal branches of government in perhaps the most sensitive area of all—control over federal, state and local budgets.

[63] *See e.g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, (1926) (diminution of 75%); *Hadachek v. C. E. Sebastian*, 239 U.S. 394, (1915) (diminution of 87½%); *Haas v. City and County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979), *cert. denied* 445 U.S. 928 (1980) (diminution of 95%).

[64] *City of Clearwater v. College Properties, Inc.*, 239 So.2d 515, 517 (Fla. 2d DCA (1970).

Legislative deliberations to enact regulations and to exercise the power of eminent domain are not identical in scope or in effect. Both involve an inquiry into the need for the public objective under consideration and the effect of the proposed action on the property in question, its immediate neighborhood, and the community as a whole. If the objective can be met with a regulation, then the government's inquiry need go no further. If the objective, however, can only be achieved through an exercise of the power of eminent domain, then the government must go further and make a cost/benefit analysis of the proposal while balancing the objective and its projected cost against all other public objectives which are competing for available budget monies. Were the courts to award compensation for overly restrictive regulation, this fundamental policy-making process of balancing competing public objectives would be eliminated, and judicial dictates could control the character of day-to-day municipal affairs. On remand from *Lake Country Estates v. Tahoe Regional Planning Agency,*[65] a United States District Court recognized this very issue.

> If a zoning ordinance is enjoined, the legislative body, rather than the court, can then decide whether the social benefits flowing from the plan warrant the exercise of eminent domain and the expenditure of public resources. When the legislature decides that the costs outweigh the benefits, it can either abandon the objective entirely, enact less stringent regulation, or combine regulation with compensation.[66]

The balance of powers is easily preserved, however, if the police power and the power of eminent domain are recognized as separate and distinct powers, and if relief from overly restrictive regulations is limited to declaratory and injunctive relief. By striking an overly restrictive regulation, the courts

[65] 440 U.S. 391, (1979). *See also,* 260 U.S. at 416.

[66] *Jacobson v. Tahoe Regional Planning Agency,* 474 F.Supp. 901, 904 (D. Nev. 1979)

preserve the legislature's opportunity to make a cost-benefit decision because the legislature is able to choose between relaxing the applicable regulations or, if they determine that the desired objective merits a budgetary allotment, institute eminent domain proceedings. In this way, the balance of powers is preserved and the constitutional wrong is vindicated.

The literal meaning accorded to the word "taking" under the Circuit Court's theory of liability will inexorably draw the courts into the daily affairs of local government and accomplish an ironic perversion of Justice Holmes' philosophy of deference to legislative discretion: "The widest scope must be permitted to the inventions of statesmanship, the experimentation and bunglings of legislatures."[67] Nothing in the Constitution provides any basis for a new constitutional rule that now, after 200 years of consistent constitutional jurisprudence during which the recognized remedy for unconstitutional regulation was invalidation, has tilted the balance away from deference to legislative discretion to a judicial theory of strict liability.

Finally, the judicial philosophy that economic costs imposed on individuals by governmental error should be distributed as a fair share cost on the public at large attempts to engraft a theory of "liability as a deterrent" on the Just Compensation Clause.[68]

> The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for

[67] Frankfurter, "Twenty Years of Mr. Justice Holmes' Constitutional Opinions," 36 *Harv. L. Rev.* 909, 928-9 (1923).

[68] It is important that this Court not confuse the constitutional imperative of just compensation with the availability of damages under 42 U.S.C. § 1983 or other equitable forms of action. *See e.g., Hernandez v. City of Lafayette,* 643 F.2d 1188 (5th Cir. 1981), *cert. denied,* 455 U.S. 907 (1982), *aff'd. after remand,* 699 F.2d 734 (1983). Whether damages are appropriate in land use cases under 42

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> officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights.[69]

The trouble with the deterrence theory is that what is an overly restrictive regulation is not amenable to the sort of detailed delineation the courts have erected under the Fifth Amendment. Justice Brennan has candidly conceded that:

> [T]his Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.[70]

Police power regulation of land use is not reducible to simple equations and the ever-changing face of our nation condemns us to an ever-shifting standard of what will be determined "overzealous." It would have been a bold and

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U.S.C. § 1983 (1970) is governed by principles of statutory construction and equity, while the availability of just compensation for overly restrictive regulations is a matter of constitutional jurisprudence and *stare decisis*. While the results under either theory may be similar, a matter to be resolved not in this case but in another case, the distinction is a significant one. That is so because the application of the damages/just compensation rules would, notwithstanding the clarity of this Court's holding, turn on the individual facts of each case. If just compensation is deemed available, notwithstanding the total absence of a doctrinal basis for such a holding, the job of judicial application will be much confused. In contrast, if the constitutional jurisprudence of *Mugler, Pennsylvania Coal, Penn Central, Agins, Hadacheck, Goldblatt* and *Andrus v. Allard* are left intact then the availability of damages, under 42 U.S.C. § 1983, if any, will be established free from the ambiguities that currently plague this area of the law.

[69] *Owen v. City of Independence, Missouri*, 445 U.S. 622, 651-52 (1980).

[70] 438 U.S. at 124

oracular official w[illegible] could have predicted with confidence that the Supreme Court of Wisconsin would sustain the wetlands regulations at issue in *Just v. Marinette County*.[71] The deterrent theory simply will not work in the face of the amorphous constitutional standards which control planning law. Consider a "Miranda" card for planning decisions repleat with "mays" and "perhaps," words that defy the concept of clear rights on which the deterrent theory is based. "You may have the right to . . ." could not survive a vagueness challenge, yet the Sixth Circuit proposes liability without a concomitant delineation of what a regulatory authority must do in order to avoid liability.

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[71] 56 Wis., 2d 7, 201 N.W.2d 761 (1972).

CONCLUSION

The opinion below departs from well-established precedents of this Court that just compensation under the Fifth Amendment is required only where government action converts a private domain to a public domain. This Court has not held that the minimum beneficial use rule commands just compensation for overly restrictive government regulation. However, the Sixth Circuit Court wrongfully and illogically holds that just compensation is required where the government's police power regulation of the use of land deprives a landowner of the minimum beneficial use of his land. Thus, the City of St. Petersburg respectfully urges this Honorable Court to reverse the judgment of the court below and hold that just compensation is required only where a governmental act invades a private domain and creates a public domain, and where the government has manifested an intent to create a public domain in the affected property.

Respectfully submitted,

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